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8
9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11
12 VICTORIA PARTNERS,
13 a Nevada partnership,
14
15 Plaintiff,

COMPLAINT

16 v.

17 DAVE & BUSTERS I, L.P.,
a Delaware limited partnership,
18
19 Defendant.

20 For its complaint against Defendant Dave & Busters I, L.P., Victoria Partners
21 alleges as follows:

22 **NATURE OF THE CASE**

23 Plaintiff Victoria Partners seeks a declaratory judgment that its use of the words
24 “EAT,” “DRINK” and “PLAY” in advertising for the Monte Carlo resort and casino in
25 Las Vegas, Nevada, does not infringe, dilute or otherwise violate any of Dave & Busters’
26 claimed rights in the “EAT DRINK PLAY” mark.
27

JURISDICTION

1
2 1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and
3 1338(a). Jurisdiction is also proper under 28 U.S.C. § 1332(a), because there is complete
4 diversity of citizenship between the parties and the amount in controversy in this action
5 exceeds \$75,000, exclusive of costs and interest.

6 2. Plaintiff Victoria Partners is a partnership with its principal place of business
7 in Las Vegas, Nevada.

8 3. Defendant Dave & Busters is a Delaware limited liability company with its
9 principal place of business in Dallas, Texas.

10 4. This Court has personal jurisdiction over Dave & Busters based on its
11 operation of a highly interactive web site accessible to residents of the State of Nevada and
12 through which such residents can: (a) register for Dave & Busters' rewards program; (b)
13 purchase gift cards for shipment into Nevada; (c) complete an event request form; (d)
14 request contact by an event planner; (e) play online games; (f) sign up for and receive
15 information about Dave & Busters; and (g) sign up for Dave & Busters Twitter feed. In
16 addition, this Court has personal jurisdiction over Dave & Busters based on its commission
17 of an intentional act aimed at the State of Nevada (namely, its demand that Victoria
18 Partners not use the EAT DRINK PLAY slogan) with the knowledge that Victoria Partners
19 is not using EAT DRINK PLAY as a trademark, that Dave & Busters does not own the
20 exclusive right to use the EAT DRINK PLAY mark, and that the brunt of the injury would
21 be felt by Victoria Partners in the State of Nevada. Victoria Partners' claim arises out of
22 Dave & Busters' demand.

23 5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b). Venue lies
24 in the unofficial Southern division of this Court.

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FACTUAL ALLEGATIONS

6. Victoria Partners owns and operates the Monte Carlo Las Vegas resort and casino on the world famous Las Vegas Strip.

7. Victoria Partners uses the MONTE CARLO mark as the primary trademark for its resort and casino business. In addition, Victoria Partners uses the UNPRETENTIOUSLY LUXURIOUS[®] mark as its tagline.

8. On its main exterior pillar sign and in certain advertising, Victoria Partners uses three words to describe what consumers can do at the Monte Carlo case: “EAT,” “DRINK,” and “PLAY.” For example, in email promotions, Victoria Partners has included a banner at the bottom of the page with three images, each containing one of the words “EAT,” “DRINK,” or “PLAY” as shown in Exhibit A. When consumers click on the word “EAT,” consumers are taken to a web page featuring the various restaurants at Monte Carlo. When consumers click on “DRINK,” consumers are taken to a web page featuring lounges at Monte Carlo. When consumers click on the word “PLAY,” consumers are taken to a web page featuring information on special events at Monte Carlo.

9. Victoria Partner’s use of “EAT,” “DRINK,” and “PLAY” does not constitute trademark use. Victoria Partners uses these terms in a purely descriptive sense, not to identify the source or origin of any goods or services. Upon information and belief, consumers would not perceive the use of the words, “EAT,” “DRINK” and “PLAY” as identifiers of the source of origin of Monte Carlo’s goods or services.

10. On May 26, 2011, Dave & Buster’s sent a cease and desist letter to Victoria Partners demanding that Victoria Partners cease using “EAT DRINK PLAY.” In the letter, Dave & Buster’s cited its United States trademark registration (Reg. No. 2,746,430) for the “EAT DRINK PLAY” mark for “billiard facility services” and “restaurant services” in International Classes 41 and 43. Dave & Buster’s claims that “[t]his registration is evidence of Dave & Buster’s exclusive right to use EAT DRINK PLAY in connection with restaurant and entertainment services.” Dave & Buster’s also claims that, based on Victoria Partners’ use of the EAT DRINK PLAY tagline, “there is a significant prospect

1 that consumers may assume a false connection or association between Dave & Buster's
2 and Monte Carlo."

3 11. Like Victoria Partners, Dave & Buster's uses the terms "EAT," "DRINK,"
4 and "PLAY" in a purely descriptive sense. On the Dave & Buster's web site, there is a
5 menu bar with buttons labeled, in order: locations, eat, drink, play, plan your event,
6 rewards, and gift cards, as shown in Exhibit B. Dave & Buster's itself is using the same
7 terms as Monte Carlo in a descriptive sense.

8 12. Upon information and belief, numerous third parties use the terms "EAT,"
9 "DRINK," or "PLAY" in a descriptive or generic sense.

10 13. Upon information and belief, the primary significance of "EAT DRINK
11 PLAY" mark to the relevant public is not as an identifier of the source or origin of any
12 goods or services.

13
14 **COUNT I**
(Declaratory Judgment
under 28 U.S.C. § 2201)

15 14. Plaintiff incorporates the allegations set forth in each of the preceding
16 paragraphs as if fully set forth herein.

17 15. An actual case and controversy exists between Plaintiff Victoria Partners and
18 Defendant Dave & Busters.

19 16. This controversy is ripe for adjudication.
20

21 **COUNT II**
(Cancellation of Trademark Registration
under 15 U.S.C. § 1064)

22 17. Plaintiff incorporates the allegations set forth in each of the preceding
23 paragraphs as if fully set forth herein.

24 18. Upon information and belief, Defendant Dave & Buster's "EAT DRINK
25 PLAY" mark is or has become generic when used in connection with all or some of the
26 services for which it was registered.
27

1 19. Victoria Partners will be suffer injury or damage from the continued
2 registration of Dave & Buster's "EAT DRINK PLAY" mark

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff Victoria Partners respectfully requests that the Court:

5 A. Enter a declaratory judgment that:

6 (1) Victoria Partners is using the terms "EAT," "DRINK" and "PLAY"
7 alone or in combination in a generic or descriptive sense as an
8 advertising slogan or to identify goods or services or describe their
9 nature, not as a trademark to identify the source or origin of Victoria
10 Partners' goods and services;

11 (2) Victoria Partners use of "EAT," "DRINK" and "PLAY" alone or in
12 combination does not infringe or otherwise violate Dave & Buster's
13 rights in the "EAT DRINK PLAY mark;" and

14 (3) Dave & Buster's "EAT DRINK PLAY" mark is or has become
15 generic for the goods and services for which it is used and registered.

16 B. Enter an order cancelling U.S. Registration No. 2,746,430, in its entirety
17 based on genericness.

18 C. Grant such other and further relief as the Court deems proper and just.

19 DATED this 21st day of June, 2011.

20 LEWIS AND ROCA LLP

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